

FREQUENTLY ASKED QUESTIONS REGARDING THE NEW PUBLIC CONSTRUCTION REFORM LAW*

Chapter 193 of the Acts of 2004, entitled "*An Act Further Regulating Public Construction In the Commonwealth*" was signed into law on July 19, 2004. Chapter 193 changed public construction statutes, thresholds, and procedures to be followed for public construction projects. Highlights of the new law include: new higher thresholds for general and filed sub-bidders; DCAM certification requirements for filed sub-bidders; prequalification requirements for both general bidders and filed sub-bidders on certain public building projects; an owner's project manager requirement for certain projects; an MBE/WBE program requirement for state funded municipal projects; and a new statute, M.G.L. c. 149A, created to permit the use of the construction manager at risk alternative delivery method on larger public building construction projects. In addition, the new law permits the use of the design build construction delivery method for larger public works projects.

****PLEASE BE ADVISED THAT THE INFORMATION PROVIDED ON THIS WEBSITE WILL BE UPDATED REGULARLY. THEREFORE, PLEASE BE SURE TO CHECK THIS WEBSITE FREQUENTLY AND CONSULT WITH YOUR LEGAL COUNSEL FOR ADDITIONAL INFORMATION.***

PREQUALIFICATION AND CERTIFICATION

- 1. What is the difference between "Prequalification" and "Certification" under the new law?**

ANSWER: "*Prequalification*" is a new process for both general contractors and subcontractors which is mandatory on all public construction projects with estimated construction costs of \$10 million or more (unless the project is undertaken by an exempt agency). Prequalification is optional at the discretion of the awarding authority where the estimated construction costs are less than \$10 million but greater than \$100,000. As set forth in Section 19 of Chapter 193, the prequalification process is administered by the awarding authority on a project-by-project basis. DCAM is in the process of promulgating regulations and guidelines to implement the new prequalification process. You should regularly check the DCAM website at <http://www.mass.gov/cam/> for updated information on the status of the prequalification regulations, guidelines and the implementation schedule. In the meantime, however, Section 19 provides detailed guidance on the required process and criteria.

"Certification" is a screening process conducted only by DCAM to determine whether a contractor or subcontractor meets certain minimum criteria to perform work on public building contracts estimated to cost \$100,000 or more procured under Chapter 149, §44A. Under the prior law, only general contractors were required to be certified by DCAM. The new law now also requires that as of January 2005, trade contractors who are filed sub-bidders must become certified in order to bid public building construction work. The new certification process for filed sub-bidders is set forth in Section 18 of Chapter 193. Upon a firm's submission of the required application and supporting documents to DCAM, DCAM will review and determine whether the firm meets the certification standards and, if warranted, issue a "Certificate of Eligibility" evidencing DCAM certification. DCAM is in the process of implementing a program for sub-bidder certification. Upon completion of that effort, regulations and guidelines pertaining to certification of both general bidders and filed sub-bidders under the new law will be published in the *Central Register* and on DCAM's website at <http://www.mass.gov/cam>.

2. How do the new immediate prequalification requirements impact the procurement of public building construction contracts?

ANSWER: As set forth in Section 19 of Chapter 193, amendments to M.G.L. c. 149 now specify that it is mandatory for awarding authorities to prequalify general bidders and filed sub-bid subcontractors for public building construction projects where the total construction cost is estimated at \$10 million or more. In addition, an awarding authority may prequalify general contractors and filed sub-bidders for projects with an estimated construction cost of \$100,000, but not to exceed \$10 million. It should also be noted that certain state agencies are exempt from mandatory prequalification, but may elect to require it at their sole option. The exempt agencies are as follows: (a) DCAM; (b) the Massachusetts Port Authority; (c) the Massachusetts Water Resources Authority; (d) the Massachusetts State Colleges Building Authority; and (e) the University of Massachusetts Building Authority.

3. How does prequalification work?

ANSWER: Prequalification is a “two phase” procurement process.

- In the first phase, the awarding authority issues by public notice a *Request for Qualifications* (“RFQ”) seeking statements of qualification from prospective general bidders and filed sub-bidders. Upon receipt of applications for qualification, the awarding authority reviews the submissions and qualifications of prospective contractors in accordance with the legal criteria and makes a determination as to which firms meet the prequalification standard. Only firms deemed prequalified may then participate in the second phase of the procurement.
- In the second phase, the awarding authority invites bids from only those general bidders and filed sub-bidders identified by the awarding authority as “qualified” to bid. The remainder of the bidding process and the award of the contract will then be conducted in accordance with the existing procedures set forth in Chapter 149.

4. As an awarding authority, why should I consider mandating prequalification where the project is below the required threshold of \$10 million?

ANSWER: An awarding authority may elect to require prequalification for general bidders and filed sub-bidders as an additional assurance that the pool of participating bidders has the requisite experience and qualifications to perform the work.

5. What is a Request for Qualifications ("RFQ")?

ANSWER: An RFQ is issued by the awarding authority to initiate the prequalification process for general bidders and filed sub-bidders. The RFQ is made by public notice and details the following information regarding the public building project:

- the time and date for receipt of responses to the RFQ, the address of the office to which the responses are to be delivered, and the timeframe in which the public agency will respond to said responses;
- a general description of the project and, for prequalification of filed sub-bid subcontractors, a general description of the subcontractor's class of work;
- the evaluation procedure and the criteria for prequalification of general bidders and filed sub-bidders, including the point rating system and the schedule for the evaluation process;
- the anticipated schedule and construction costs for the building project;
- a listing of the project team, including the awarding authority, the designer, and awarding authority's owner's project manager, if applicable;
- a statement that the RFQ will be used to prequalify general bidders and filed sub-bidders who will be invited to submit a bid pursuant to sections 44E and 44F;
- a prohibition against any unauthorized communication or contact with the public agency outside of official pre-bid meetings, and if desired;
- any limitation on the size and number of pages to be included in the response to the RFQ desired by the public agency.

6. What information must be included in a statement of qualifications submitted in response to an RFQ?

ANSWER: Under Section 19 of Chapter 193, amendments to M. G. L. c. 149 specify that awarding authorities can require only four categories of information in the statement of qualifications from prospective general bidders and sub-bidders. Generally, these categories of information are: (1) management experience; (2) references; (3) capacity to complete the project; and (4) written commitment of bonding company to issue payment and performance bonds for the full value of the project. The financial information submitted with the RFQ application shall not be considered a public record.

The criteria and weight given to each of these categories of information supplied by the prospective bidder is set forth in more detail in Section 19. In addition, DCAM is in the process of promulgating regulations and guidelines to implement the prequalification process. You should regularly check the DCAM website at <http://www.mass.gov/cam/> for updated information on the status of the prequalification regulations, guidelines and implementation schedule.

7. What is the evaluation process for determining prequalification?

ANSWER: Under Section 19 of Chapter 193 amendments to M.G.L. c. 149, an awarding authority is first required to establish a *Prequalification Committee* for each public building construction project where prequalification is mandated or elected by the awarding authority. The prequalification committee consists of one representative from the designer and three representatives from the awarding authority. The prequalification committee is required to evaluate and weigh the qualifications of each applicant firm in accordance with the criteria specified in the RFQ and make a determination as to whether the applicant is qualified to bid on the project. Be advised that according to the statute, the decision of the *Prequalification Committee* is final and is not subject to appeal unless there is evidence of fraud or collusion.

DCAM is in the process of promulgating regulations and guidelines to implement the new prequalification process. You should regularly check the DCAM website at <http://www.mass.gov/cam/> for updated information on the status of the prequalification regulations, guidelines and the implementation schedule. In the meantime, however, Section 19 provides detailed guidance on the process and criteria.

8. **As an awarding authority, if we initiated our project before the new law was enacted on July 19, 2004, do we still have to prequalify general bidders and sub-bidders?**

ANSWER: It depends on what stage the project was in when the new law took effect on July 19, 2004. If you had already opened file sub-bids or general bids prior to July 19, 2004, then you do not have to prequalify and re-bid. If you did not open bids prior to July 19, 2004, however, you should check with your legal counsel to determine whether prequalification is required.

9. **What is a *Certificate of Eligibility*?**

ANSWER: A *Certificate of Eligibility* is a one page document issued annually by DCAM on DCAM letterhead that confirms that a general bidder or filed sub-bidder is DCAM certified and permitted to bid on public building constructions projects. A *Certificate of Eligibility* may be issued to a contractor or subcontractor upon completion of the application and review process conducted by DCAM. The certificate will contain the name of the contractor, the area or areas of work in which it is certified and other relevant information. All prospective general bidders and filed sub-bidders (for sub-bidders the requirement is effective as of January 1, 2005) must submit the certificate of eligibility with their bids on public building construction contracts where the general contract is estimated to exceed \$100,000 and the subcontract is estimated to exceed \$20,000 and the awarding authority has identified the subcontract work as filed sub-bid work, in accordance with Section 44F of M.G.L. c. 149.

10. **What is an *Update Statement*?**

ANSWER: An *Update Statement* is a standard DCAM form required to be completed and signed by the contractor and submitted by all general bidders and filed sub-bidders with their bids on public building construction projects requiring DCAM certification of general and filed sub-bidders.

11. **If I am certified as a general contractor for a particular trade under the prior law for certification of prime contractors, will I be certified as a sub-bidder for that trade under the new law for sub-bidder certification?**

ANSWER: Yes. As subcontractor certification is implemented, further information will be available on DCAM's website at <http://www.mass.gov/cam>.

12. **If I am a subcontractor intending to submit a filed sub-bid on a public construction project, when will I be required to be DCAM certified under the new law?**

ANSWER: As indicated above, Section 18 of Chapter 193, amendments to M.G.L. c.149, pertaining to the certification of filed sub-bidders does not take effect **until January 1, 2005**. DCAM is in the process of implementing a program for sub-bidder certification. Upon completion of that effort, regulations and guidelines pertaining to certification under the new law will be published in the *Central Register* and on DCAM's website at <http://www.mass.gov/cam>.

13. **If I am a subcontractor intending to submit a sub-bid on a public construction project, will I need to have a certificate of eligibility from DCAM by the January 1, 2005 effective date in order to bid?**

ANSWER: No. Until such time as DCAM has had the opportunity to implement the certification process for filed sub-bidders in a particular trade, you will not be precluded from bidding on public construction projects.

You should, however, regularly check the DCAM website at <http://www.mass.gov/cam/> for updated information on the status of the regulations, guidelines and the implementation schedule.

14. As a public awarding authority, do I need to reject bids from filed sub-bidders that are not DCAM certified as of January 1, 2005?

ANSWER: No. Until such time as DCAM has had the opportunity to implement the certification process for filed sub-bidders, you must accept bids from sub-bidders who are not yet DCAM certified on public construction projects. You should, however, regularly check the DCAM website at <http://www.mass.gov/cam/> for updated information on the status of subcontractor certification and the regulations, guidelines and implementation schedule. Also, effective immediately, an awarding authority may elect to utilize the new prequalification process to prequalify sub-bidders, if the construction costs for the project are estimated to exceed \$100,000. (For projects with estimated construction costs of \$10 million or more, the prequalification process is mandatory).

15. What types of subcontractors will need to be certified under the new law?

ANSWER: As set forth in Section 18 of Chapter 193, effective January 1, 2005, all sub-bidders intending to submit a filed sub-bid for a public building construction project subject to Chapter 149 §44A with an estimated general contract cost in excess of \$100,000 are required to be certified by DCAM. As noted in Chapter 149, §44F, filed sub-bidding occurs where there is an estimated subcontract cost for the particular trade in excess of \$20,000 and where the work falls into one of the classes of work identified in §44F and by the awarding authority in the bid documents.